IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. ~~644~~ 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATUTES.

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On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent, The Willett Company, an Illinois corporation, presents this statement in opposition to the Petition for Writ of Certiorari to the Supreme Court of Illinois and respectfully submits the following:—

OPINION OF THE SUPREME COURT OF ILLINOIS.

The original opinion of the Supreme Court of Illinois may be found in the transcript of record (R. 23-29) and is officially reported in 406 Ill. 286, 94 N. E. (2d) 195. The clarification opinion rendered by the Supreme Court of Illinois pursuant to mandate of this Court is set forth in the record. (R. 39-40)

JURISDICTIONAL STATEMENT.

The petitioner relies upon subdivision 3 of section 1257 of Title 28 Judiciary and Judicial Procedure to give juris-

diction to the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois.

QUESTIONS PRESENTED.

The questions here presented are

1. Whether the decision of the Supreme Court of Illinois affirming the judgment of the Municipal Court of Chicago finding the respondent "not guilty" of a violation of the Carter's Ordinance on the evidence presented, involving any title, right, privilege or immunity especially set up or claimed under the Commerce Clause of the Federal Constitution.

2. Whether the discussion by the Supreme Court of Illinois concerning the constitutional question is necessary to their decision that "* * * it was not the legislative intent in the enactment of this statute to impinge upon interstate commerce, or to interfere with it in any way whatsoever," (R. 25)

3. Whether the decision of the Supreme Court of Illinois holding "that it was not the intent of the legislative authority of the city of Chicago to include by the use of the phrase 'within the city' the operations of the respondent corporation" (R. 26) involves a federal question so as to subject the decision to a review by this court under subsection 3 of section 1257 of Title 28, Judiciary and Judicial Procedure.

4. Whether the decision of the Supreme Court of Illinois that the Ordinance created a burden on interstate commerce is supported by the evidence or inferences that can be reasonably drawn from the evidence.

5. Whether the purported decision of the Supreme Court of Illinois on the alleged federal question is contrary to the decisions of this Court on that question.

ARGUMENT.

Objections to Jurisdiction.

I.

The Supreme Court of Illinois did not decide a Federal question.

In the inception it is pointed out (1) that the decision of the Supreme Court of Illinois does not draw into question the validity of any treaty or statute of the United States; (2) that the decision of the Supreme Court of Illinois does not hold the Carter's Ordinance of the City of Chicago repugnant to the Constitution, Treaties or Laws of the United States; (3) nor does it decide any question of Title, Right, Privilege or Immunity claimed under the Constitution, Treaties, or Statutes of the United States; U.S.C.A., Title 28, 1257-3.

The Supreme Court of Illinois in the case at bar merely construed an Ordinance of the City of Chicago and held that the words "within the city" limited the operation of the Ordinance to transportation wholly within the corporate limits of the City of Chicago and was not applicable to the particular business of the respondent which consisted not only of business done within the corporate limits of the City of Chicago but extended to intrastate and interstate business.

The opinion of the Supreme Court specifically held that the ordinance in question "is not invalid by its terms." (R. 25) The Supreme Court found that it was not the intent of the Council of the City of Chicago to impose an occupational tax upon the operations of the respondent

or others similarly situated. Succinctly stated, the Court merely construed the ordinance and found that it was not the legislative intent to levy an occupational tax upon 'carters', whose operations were not confined to the corporate limits of the City of Chicago, and who were engaged in intra and interstate commerce.

The petitioner on page 6 of their petition states that the Supplemental Clarifying Opinion of the Illinois Supreme Court expressly declares that the basis for the present judgment is the court's conclusion that the Commerce Clause of the Federal Constitution prevents a municipal tax * * * from being applied to the respondent's purely local cartage operation because they are inseparably linked with respondent's interstate business. A careful reading of the Clarifying Opinion does not support this assertion. The Court specifically said:

> "Our decision is that the Chicago Carter's Ordinance is valid, but, in the light of the rule of the foregoing cases could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from the application of the license tax. (R. 40)"

This statement of the Supreme Court of Illinois is entirely consistent with their original decision *that it was not the intent of the city council to include the business of Carter's doing business outside of the corporate limits of the City of Chicago.* (R. 32)

The Supreme Court of Illinois in defining the issues states that the question here is one of application of the Ordinance to the particular aspects of the hauling done by the defendant. (R. 33.) The petitioner on page 12 of their petition admits that "the Supreme Court of Illinoi construed the ordinance as confined to local transporta-

tion and that it is not intended to tax interstate business. (Pet. 12, R. 25) but maintained that the decision does not "dissipate the error of that Court's ruling on a substantial federal question * * *." (Pet. 12)

On page 13 of their petition the petitioner states

> "The ordinance is actually limited in its coverage to purely local business and casts no burden whatever upon interstate commerce because it neither purports to nor does it in fact levy any tax upon respondent's operations. The indivisibility of respondent's interstate and intrastate business constitutes no grounds for invoking the Commerce Clause as a bar to a fair and reasonable tax levied in respect to respondent's purely local business."

The fallacy of this argument is clearly demonstrated when we consider the fact that every truck used by the respondent carried both local, intrastate and interstate shipments. The tax is levied upon an instrumentality used in interstate commerce. This is especially true because both the Municipal Court of Chicago and Supreme Court of Illinois found as a fact that it is impossible for the respondent to separate one from the other or to give up its intra-city business and continue its inter-state business.

The petitioner under its Summary at page 2 sets forth that the decision of the Supreme Court of Illinois which held the ordinance of the City of Chicago unenforceable as against the respondent corporation was predicated "on the sole ground that it was obnoxious to the commerce clause of the Federal Constitution", while on page 4 of the petition it asserts;—

> "Although the Supreme Court of Illinois construed the ordinance, and the tax prescribed thereby, as limited to purely intracity transportation (R. 25), it nevertheless held the ordinance unenforceable as

an impermissible interference with the Federal commerce powers * * *." (R. 29)

Again on page 12 it is set forth that:

> "The Supreme Court of Illinois construed the ordinance as confined to local transportation and as not intending to tax interstate business." (R. 25)

The Supreme Court of Illinois in passing on this question said:—

> "We, therefore concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; * * *." (R. 25)

This case was decided on purely non-federal ground independently sufficient to support the judgment. (*Wood* v. *Chesborough*, 228 U. S. 672, 676-80; *West Chicago St. R. Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506, 519-20; *Chicago B & Q R. Co.* v. *Illinois ex rel. Commissioners*, 200 U. S. 561, 581; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54-5; *Adams* v. *Russell*, 229 U. S. 353, 358; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Phyle* v. *Duffy*, 334 U. S. 431; *Williams* v. *Kaiser*, 323 U. S. 471, 477.)

No Federal question was adjudicated by the Supreme Court of Illinois and its decision was predicated upon the adequate and independent non-federal ground that it was not the intent of the Council of the City of Chicago to levy an occupational tax upon "carters" engaged in intrastate outside the territorial limits of Chicago. It merely construed the phrase "within the City of Chicago" as used in the Carter's Ordinance to exclude all transportation where the point of origin and the point of destination were not both within the corporate limits of the City of Chicago.

The ordinance of the City of Chicago was an attempt by the City of Chicago under its delegated legislative authority to tax "every express wagon, cart, truck, automobile, car truck, etc. * * * employed for the purpose of transporting or conveying bundles, parcels, etc. * * * within the city of Chicago for hire or reward." (R. 5)

The respondent argued both in the Municipal Court of Chicago and in the Supreme Court of Illinois that the phrase "within the city" did not limit the operation of the ordinance to operations where both the point of origin and the point of destination are in the city and for this reason include shipments which were but a part of interstate commerce and that the ordinance when so construed constituted an interference with and a burden upon interstate commerce in violation of the Federal Constitution. (R. 19)

The City of Chicago in opposition to this contention maintained that the ordinance in question neither purported nor attempted to tax cartage operations beyond the corporate limits of the City of Chicago and sought to have the words "within the city" so construed and interpreted. (R. 17)

The City's Brief filed in the State Supreme Court set forth this contention as follows:—

> "We wish to make it clear that by intracity business we do not mean to indicate even a trip from a point within the city which is but a segment of an intercity or interstate journey but only such trips as begin and end within the city and do not form a part of a longer journey traversing City or State lines."

The Supreme Court of Illinois rejected the argument of the respondent "Cartage Company" and adopted the in-

terpretation of the words "within the city" suggested by the petitioner. (R. 24.) The question of whether or not it was the intent of the City of Chicago in passing the ordinance in question to include the intrastate and interstate business of the defendant corporation is clearly a non-federal question. The State Court stated that the question is one of application of the ordinance to the practical aspects of the hauling done by the defendant. (R. 25) In adopting this construction of the words "within the city" the Supreme Court of Illinois followed the case of *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, and held that the phrase "within the city" as used in the ordinance meant purely intra-city commerce.

A Writ of Certiorari must be dismissed, where the state court's decision rests on non federal ground, notwithstanding unnecessary discussion of constitutional question. *Geo. O. Richardson Machinery Co.* v. *Scott,* Okl. 1928, 48 S. Ct. 264; 276 U. S. 128, 72 L. Ed. 497; *McCoy* v. *Shaw,* Okl. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891.

The Federal Supreme Court will not review a state court decision resting on an adequate and independent non federal ground, through the decision also rests upon an erroneous view of federal law. *Radio Station WOW* v. *Johnson,* Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.

Where a decision of state court might have been either upon a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it. *Williams* v. *Kaiser,* Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398; *Fox Film Corporation* v. *Muller,* Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158; *Lynch* v. *People of New York ex rel. Pierson,* 1934, 55 S. Ct. 16, 293

U. S. 52, 79 L. Ed. 191; *Klinger* v. *Missouri*, Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.

The construction placed on a state law or ordinance is conclusive on United States Supreme Court. *International Union, U.A.W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Bd.*, Wis. 1949, 69 S. Ct. 516, 336 U. S. 245; *Oklahoma Tax. Commission* v. *Texas Co.*, Okl. 1949, 69 S. Ct. 561, 336 U. S. 342.

What the statutes of a state means, the extent to which it may be limited are questions on which the highest court of a state has the final word. *Musser* v. *State of Utah*, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562; *Senn* v. *Tile Layers Protective Union, Local No. 5*, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also *Atchison, T. & S. F. Ry. Co. Co.* v. *Railroad Commission of State of California*, 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128.

A federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce among the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation. *Erie R. Co.* v. *Purdy*, N.Y. 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

The Supreme Court of Illinois in its Opinion outlined the nature of the business conducted by the respondent and in so doing stated:

> "It appears, insofar as can be ascertained from this record, that the defendant herein operated its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the City of Chicago the defendant itself does not determine what articles it should carry on

its trucks but carries articles of all kinds, in interstate, intrastate and intracity traffic It has no basis for a differentiation between the shipments which it carried on its trucks but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of trucks are so intermingled as to be impossible of separation, *it is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a Carter's Ordinance.*" (R. 26, 27) (Italics ours)

II.

The Decision Is Not In Conflict With Federal Law.

The Supreme Court in construing the ordinance held that it was not repugnant to the Constitution and held the ordinance to be valid. The discussion in the State Supreme Court's opinion regarding the question of interstate commerce is mere *dictum.* However, the general principles expressed by the Court in regard to the Federal Interstate Commerce Clause of the Constitution and its application to the case at bar is in complete accord with the decisions of this Court.

In order to properly present the issues raised in this Court it is necessary to outline the nature of the respondent's business as shown in the record. The respondent owned a number of trucks which they leased to various concerns in the City of Chicago. The trucks were leased by the day, week, month or year or on a mileage basis. The respondent furnished a driver with each truck who was loaned to a lessee. The lessee placed various parcels, packages, etc. in the truck and they were carried (1) from places within and outside the city to places within the city (2) to points outside the city but within

the state and (3) to points outside of the State. The respondent exercised no control over the vehicles or the destination or the nature of the freight carried. (R. 12)

The contract of the respondent with the Pennsylvania Railroad Co. is a fair example of the nature of the defendant's business. The defendant company leased to the Pennsylvania Railroad Co. certain of its trucks and supplied the Railroad Company with drivers. The Pennsylvania Railroad Co. used these trucks to pick up packages and freight which were delivered to the Pennsylvania Railroad Company station in Chicago from points both within and outside of the city. These parcels were then transported by the railroad to points outside of the City of Chicago either within the state or to points beyond the state line. The trucks were also used by the Pennsylvania Railroad Company to transport freight and parcels coming into the railway station from points outside the city to points within the City. As far as cartage in the respondent's trucks was concerned the entire carriage was from a point within the City of Chicago to a point within the City of Chicago but this carriage was largely an integral part of interstate transportation. The origin of this freight may have been New York and its destination may have been Los Angeles. Similarly the freight transported in these trucks may have had its origin in New York State and its destination may have been Los Angeles or its origin may have been in the City of Chicago and its destination New York. In this case the transportation would be entirely within the city limits as far as the trucks are concerned yet the carriage would be but a segment of interstate copmerce. Under the ordinance the vehicle would be subject to the tax. If the Supreme Court of Illinois had held that the phrase

"within the City of Chicago" as used in the ordinance included this type of transportation the Federal question of whether or not the ordinance was repugnant to the Federal Constitution would have been an issue.

In the case of the *Northern Pacific Ry. Co.* v. *Washington* (222 U. S. 370, 375), the train in question although operating from one point to another in the State of Washington, was also hauling merchandise from points outside of the State, destined to points within the State, and from points within the State to British Columbia as well as carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. The Court held this to be interstate commerce and the train an interstate train, despite the fact that it also carried local freight between points in the State of Washington and in view of the unity and indivisibility of the service and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.

This is the same situation that exists in the case at bar. Under the contract of the defendant with the Pennsylvania Railroad Co., the defendant carries freight in interstate commerce as well as freight in intrastate and local commerce. The tax in question is directed against the vehicle carrying these packages. This vehicle in the case at bar is an integral instrumentality of interstate commerce. This ordinance is an attempt to tax the instrumentality.

In the cases of *Osborne* v. *Florida*, 164 U. S. 650 and *Pullman Company* v. *Adams*, 189 U. S. 420, this Court held similar enactments valid only because it affirmatively appeared that the intrastate and interstate business of the defendant was separable. In the case at bar the evi-

dence clearly shows and both the Municipal Court of Chicago and the Supreme Court of Illinois held, in a finding of fact, that it was "impossible to separate the intracity, intrastate and interstate business of the respondent."

The case of *Sprout* v. *South Bend* (277 U. S. 166) is a case involving an ordinance of the City of South Bend, Indiana prohibiting with certain exceptions the operation on its streets of any motor bus for hire unless licensed by the City. The carrier claimed that the ordinance violated the Commerce Clause and the Equal Protection Clause of the Fourth Amendment. Sprout carried passengers both in intrastate and interstate commerce. The license fee imposed was not an incident to any scheme of municipal reglations but as in the case at bar was for revenue only. In this case, the court held:

> "It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce.
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> * * * * * * *
>
> And it may delegate a part of that power to a municipality.
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> * * * * * * *
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> But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increated because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate

business. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Adams Express Co.* v. *New York*, 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 647. Compare *Williams* v. *Talladega*, 226 U. S. 404, 417; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall*, 267 U. S. 307; *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax."

In the case at bar the Ordinance levies a license fee upon "carts" in accordance with their hauling capacity. The tax is the same for "carts" delivering one or two packages a day "within the City of Chicago," and for carts employed entirely in local transportation. It does not distinguish between freight that is transported from point to point in the city where the carriage of such freight is a part of its passage in interstate commerce.

In the *Sprout* case at page 167 the Court said:

> "The ordinance makes no distinction between busses engaged exclusively in interstate commerce from those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce."

In *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U. S. 384, the State of Montana taxed each telephone used by the defendant. The telephones were used in intrastate and interstate commerce. The company could not discontinue its intrastate business without destroying its interstate business. In passing upon this case the Court said at page 392:

"A State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Mobile*, 127 U. S. 640. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax which covers the entire operations." *id.* p. 647; See *Williams* v. *Talladega*, 226 U. S. 404, 419. Where the tax is exacted from doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; *and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.* *Sprout* v. *South Bend*, 277 U. S. 163, 171; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470.

"*A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid.* *Leloup* v. *Mobile, supra; Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *Crutcher* v. *Kentucky*, 141 U. S. 47, 59; *Adams Express Co.* v. *New York*, 232 U. S. 14, 29, 31; *United States Express Co.* v. *New York*, 232 U. S. 35, 36; *Bowman* v. *Continental Oil Co.*, 256 U. S. 647, 648. *In the case of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments 'were handled in the same vehicles, and by the same men' that were employed in connection with the interstate transportation and it was*

impracticable to effect a separation. Adams Express Co. v. New York, supra; United States Express Co. v. New York, supra. In *Bowman v. Continental Oil Co. (supra) the question arose under a statute of New Mexico, laying an annual license tax of fifty dollars for each station distributing gasoline.*" (Italics ours)

Again the attention of this Court is called to the finding of the Supreme Court of Illinois that the interstate, intrastate and intracity business of the respondent was inseparable and that the respondent could not discontinue one and remain in business.

The petitioner relies upon the case of *Pacific Telephone & Telegraph Co. v. Washington Tax Commission,* 297 U. S. 403, 80 L. Ed. 760 but fails to point out that in that case although the Pacific Telephone and Telegraph Company was engaged in both inter and intrastate commerce, the tax was levied solely upon the gross income from intrastate commerce. It was not a tax levied upon an instrumentality used in both local and interstate commerce, as in the case at bar, but a tax levied solely on the gross income from intrastate commerce.

A tax on an instrumentality used in interstate commerce is a burden on interstate commerce and such a tax cannot be sustained unless it appears affirmatively in some way that the tax is levied only as compensation for the use of the highway or to defray the expenses of regulating motor traffic. Unless it is shown that the nature of the imposition is such as is directly proportionate to the use of the roads or services rendered by the city or if it bears no reasonable relation to the privilege of using the highway, it cannot be given presumptive validity. *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245; *Sprout v. South Bend,* 277 U. S. 170.

The petitioner maintains that the record is wholly lacking in proof upon the vital issue of undue burden on interstate commerce.

The record in this case shows and the Supreme Court of Illinois found, as a fact, that the respondent was engaged in intrastate, interstate and local freight in the City of Chicago and that the company operated from Chicago to surrounding States and in that manner was engaged in interstate commerce. The undisputed evidence further showed that the respondent did not keep records of the shipments it made within the City of Chicago or what shipments were interstate, intracity or intrastate in their character because the respondent had no control over the commodities carried. Its trucks were under contracts with large industries and in the main with other interstate carriers bringing property into the City of Chicago. These companies exclusively controlled the operation. The defendant itself did not determine what articles were carried in the trucks but carried articles of all kinds in the sole discretion of the contractors, retailers or carriers with whom it was dealing and the respondent further showed that it did not keep records of the shipments because it did not handle the shipments as such and did not go from house to house picking up shipments for delivery within the city but its entire business was concerned with hauling under contracts for various firms, enterprises and other carriers in the City of Chicago. The undisputed evidence further showed that because of this arrangement there was no possible way in which they could determine the proportion of local transportation as compared with intrastate or interstate traffic but that in all its operations every truck had some type of all freight on it during the course of a year.

Upon this undisputed evidence both the Municipal Court of Chicago and the Supreme Court of Illinois held that the defendant was not able to separate its intrastate business from its interstate business and that it could not continue to operate in any one of the operations without giving up its entire business and that in order to operate it needed all of its business to keep in operation. It necessarily follows that if the respondent in any truck carried any intracity freight at any time within the taxable year, that truck was subject to the levy of the ordinance. It is apparent that the tax is levied without respect to the quantity or volume of intracity traffic.

III.

The ordinance constitutes an undue burden upon interstate commerce.

The evidence in this case clearly shows that the defendant was engaged in interstate, intrastate and local commerce and that it was not possible to separate the local and the intracity freight from the interstate freight and that the respondent did not have control of the loading or destination of the trucks so that it could differentiate between the various type of shipments carried on the truck. The Petitioner admits that the shipments were inseparable but argues that this fact is insufficient to show the ordinance constituted an undue burden upon interstate commerce.

In the case of *Cooney, Governor of Montana* v. *The Mountain States Telephone and Telegraph Company*, 294 U. S. 384, where a tax was levied upon telephone used both in intra and interstate business the Court held the tax, being indiscriminate in its application, *necessarily burdened interstate commerce.*

It is obvious that the tax proposed by the ordinance unless the construction of the State court is accepted is a tax upon trucks that carry both intrastate and interstate freight. A tax upon an instrumentality of interstate commerce, even though small in amount, is necessarily a burden upon interstate commerce because it increases the cost of operating in interstate commerce while a tax upon the gross local business is not a burden *per se* and proof is required to establish it.

It is an established rule of law in this State that the Supreme Court will not reverse a trial court upon a question of fact unless there is a total lack of evidence or inferences that may be drawn from the evidence tending to support the finding of the trial court. Certainly the evidence is sufficient to establish that the tax upon these instruments used in interstate commerce constitute a burden upon interstate commerce.

IV.

There are no important questions of law or policy involved.

It is respectfully submitted that this case presents no important questions of Federal Law and that it is not in conflict with the decision of this Court or with those of any other Federal Court of Appellate jurisdiction. There is no showing that this decision is applicable to any other firm or corporation operating elsewhere in the State of Illinois or that it will have an important or far reaching application. The State Court merely construed the ordinance in question and held it valid and that the ordinance as construed was not repugnant to the Commerce Clause of the Federal Constitution but that it was inapplicable to the operations of this particular respondent.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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